



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Surface Transportation Project Delivery Program; Utah Department of Transportation Audit Report

[FHWA Docket No. FHWA-2019-0009]

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice; Request for comment.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice announces and solicits comments on the second audit report for the Utah Department of Transportation (UDOT).

DATES: Comments must be received on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Mail or hand deliver comments to Docket Management

Facility: U.S. Department of Transportation, 1200 New Jersey

Avenue SE., Room W12-140, Washington, DC 20590. You may also

submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically.

Anyone can search the electronic form of all comments in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to

www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Ms. Deirdre Remley, Office of Project Development and Environmental Review, (202) 366-0524, *Deirdre.Remley@dot.gov*, or Mr. David Sett, Office of the Chief Counsel, (404) 562-3676, *David.Sett@dot.gov*, Federal Highway Administration, U.S. Department of Transportation, 60 Forsyth Street 8M5, Atlanta, GA 30303. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The UDOT published its application for NEPA assumption on October 9, 2015, and made it available for public comment for 30 days. After considering public comments, UDOT submitted its application to FHWA on December 1, 2015. The application served as the basis for developing a memorandum of understanding (MOU) that identified the responsibilities and obligations that UDOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on November 16, 2016, with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FHWA and UDOT considered comments and proceeded to execute the MOU. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The FHWA must make the results of each audit available for public comment. The first audit report of UDOT compliance was

finalized on September 17, 2018. This notice announces the availability of the second audit report for UDOT and solicits public comment on the same.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C 327; 23 CFR 773.

Issued on: April 8, 2019.

Brandye L. Hendrickson
Deputy Administrator
Federal Highway Administration

Surface Transportation Project Delivery Program
Draft FHWA Audit of the Utah Department of Transportation
June 10, 2017 – June 30, 2018

Executive Summary

This report summarizes the results of the Federal Highway Administration’s (FHWA) second audit of the Utah Department of Transportation’s (UDOT) National Environmental Policy Act (NEPA) review responsibilities and obligations that FHWA has assigned and UDOT has assumed pursuant to 23 United States Code (U.S.C.) 327. Throughout this report, FHWA uses the term “NEPA Assignment Program” to refer to the program codified at 23 U.S.C. 327. Under the authority of 23 U.S.C. 327, UDOT and FHWA executed a memorandum of understanding (MOU) on January 17, 2017, to memorialize UDOT’s NEPA responsibilities and liabilities for Federal-aid highway projects and certain other FHWA approvals for transportation projects in Utah. The FHWA’s only NEPA responsibilities in Utah are oversight and review of how UDOT executes its NEPA Assignment Program obligations. The section 327 MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated documented categorical exclusions (DCE). A separate MOU, pursuant to 23 U.S.C. 326, authorizes UDOT’s environmental review responsibilities for other categorical exclusions (CE), commonly known as CE Program Assignment. This audit does not cover the CE Program Assignment responsibilities and projects.

As part of its review responsibilities under 23 U.S.C. 327, FHWA formed a team (the “Audit Team”) in July 2018 to plan and conduct an audit of NEPA responsibilities UDOT assumed. Prior to the on-site visit, the Audit Team reviewed UDOT’s NEPA project files, UDOT’s response to FHWA’s pre-audit information request (PAIR), UDOT’s self-assessment of its NEPA Program, UDOT’s NEPA Quality Assurance/Quality Control (QA/QC) Guidance, its NEPA Assignment Training Plan, and its NEPA Assignment Self-Assessment Report. The Audit Team conducted an on-site review during the week of October 15 to October 18, 2018. The Audit Team conducted interviews with seven members of UDOT central office staff, three staff members of UDOT’s legal counsel, and two staff members from the Utah State Historic Preservation Office as part of this on-site review.

Overall, the Audit Team found that UDOT is successfully adding DCE, EA, and EIS project review responsibilities to an already successful CE review program. The UDOT

has made efforts to respond to FHWA findings of the first audit, including improving document management, internal communication, and use of terms related to Section 4(f). In the first audit, FHWA Audit Team made the observation that there was inconsistent understanding of QA/QC procedures among UDOT staff. In the second audit, FHWA Audit Team identified an observation related to four instances of UDOT's lack of adherence to its QA/QC procedures. In addition, although UDOT has improved its document management, the second audit found that UDOT continues to lack procedures for retaining draft and deliberative materials for project records.

The Audit Team identified two observations as well as several successful practices. The Audit Team finds UDOT is carrying out the responsibilities it has assumed and is in substantial compliance with the provisions of the MOU.

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects and certain FHWA approvals. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA and other related environmental laws. Examples of responsibilities UDOT has assumed in addition to NEPA include section 7 consultation under the Endangered Species Act and consultation under section 106 of the National Historic Preservation Act.

Following this second audit, FHWA will conduct two more annual audits to satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. Audits are the primary mechanism through which FHWA may oversee UDOT's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating UDOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the Federal Register.

The Audit Team consisted of NEPA subject matter experts from FHWA Utah Division, as well as additional FHWA Division staff from California, the District of Columbia, Georgia, and Alaska. These experts received training on how to evaluate implementation of the NEPA Assignment Program.

Scope and Methodology

The Audit Team conducted an examination of UDOT's NEPA project files, UDOT responses to the PAIR, and UDOT self-assessment. The audit also included interviews with staff and reviews of UDOT policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; QA/QC; legal sufficiency; training; and performance measurement.

The focus of the audit was on UDOT's process and program implementation. Therefore, while the Audit Team reviewed project files to evaluate UDOT's NEPA process and procedures, the Audit Team did not evaluate UDOT's project-specific decisions to determine if they were, in FHWA's opinion, correct or not. The Audit Team reviewed 23 NEPA Project files with DCEs, EAs, and EISs, representing all projects with decision points or other actionable items between June 10, 2017, and June 30, 2018. The Audit Team also interviewed environmental staff in UDOT's headquarters office.

The PAIR consisted of 29 questions about specific elements in the MOU. The Audit Team used UDOT's response to the PAIR to develop specific follow-up questions for the on-site interviews with UDOT staff.

The Audit Team conducted seven in-person interviews with UDOT environmental staff, one in-person interview with two staff members of the UDOT State Historic Preservation Office, two phone interviews with UDOT's outside legal counsel, and one interview with legal counsel from the Utah Attorney General's office. The Audit Team invited UDOT staff, middle management, and executive management to participate to ensure the interviews represented a diverse range of staff expertise, experience, and program responsibility.

Throughout the document reviews and interviews, the Audit Team verified information on the UDOT NEPA Assignment Program including UDOT policies, guidance, manuals, and reports. This included the NEPA QA/QC Guidance, the NEPA Assignment Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team compared the procedures outlined in UDOT environmental manuals and policies to the information obtained during interviews and project file reviews to determine if there were discrepancies between UDOT's performance and documented

procedures. The Audit Team documented observations under the six NEPA Assignment Program topic areas. Below are the audit results.

Overall, UDOT has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and, as such, the Audit Team finds UDOT is substantially compliant with the provisions of the MOU.

Observations and Successful Practices

This section summarizes the Audit Team's observations of UDOT's NEPA Assignment Program implementation, including successful practices UDOT may want to continue or expand. Successful practices are positive results FHWA would like to commend UDOT for developing. These may include ideas or concepts that UDOT has planned but not yet implemented. Observations are items the Audit Team would like to draw UDOT's attention to that may benefit from revisions to improve processes, procedures, or outcomes. The UDOT may have already taken steps to address or improve upon the Audit Team's observations, but, at the time of the audit, they appeared to be areas where UDOT could make improvements. This report addresses all six MOU topic areas as separate discussions. Under each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for UDOT to implement actions to improve their program. The FHWA will consider the status of areas identified for potential improvement in this audit's observations as part of the scope of Audit #3. The third audit report will include a summary discussion that describes progress since the last audit.

Program Management

Successful Practices

The UDOT and FHWA Division office meet on a quarterly basis to keep staff updated on current topics related to UDOT's implementation of the NEPA Assignment Program. During FHWA/UDOT quarterly meetings, the agencies work to ensure project delivery schedules of non-assigned Federal actions, such as Federal land transfers and Interstate access change requests as they relate to projects assigned to UDOT under the MOU. This meeting is also used to address program-level NEPA Assignment questions, such as clarifying starting dates of EAs for performance tracking.

Documentation and Records Management

Successful Practices

ProjectWise is a document database UDOT uses to maintain final project records for DCEs, EAs, and EISs. Though it was not developed specifically for producing and maintaining environmental documents, ProjectWise is accessible to all staff and can store final environmental documents and technical reports. Since the last audit, UDOT has started using organizational tools, such as subfolders in ProjectWise, to better organize final environmental documents. Once the environmental review process is complete for a project and the consultant has submitted final project files, UDOT uses project record checklists to confirm completeness of ProjectWise files.

Observation #1: Incomplete Retention of Environmental Project Records

The project reviews and interviews determined UDOT retains final environmental documents such as EAs, Draft EISs, Final EISs, Findings of No Significant Impact, and Records of Decision, and certain technical reports in ProjectWise. There is, however, no procedure for retaining other types of supporting materials that inform NEPA decisions and other environmental determinations. Other records, such as meeting summaries documenting coordination with resource agencies and stakeholders or telephone memos documenting conversations used to gather substantive information related to environmental decisions, were generally absent from the ProjectWise files reviewed. Some environmental staff said they store these types of documents on personal drives, local servers, or as hardcopy in filing cabinets. This dispersal and inconsistency of recordkeeping could result in document loss and difficulty of retrieval, hampering the ability to demonstrate support for Agency decisions, including compilation of administrative records in legal challenges.

Quality Assurance/Quality Control

Observation #2: Inconsistent application of UDOT's QA/QC procedures.

Section 8.2.4 of the MOU requires UDOT to develop a QA/QC process. Project file reviews revealed that one of the two Draft EISs that UDOT approved for circulation during the audit period occurred prior to completion of the required QA/QC process. This approval was not in accordance with either the QA/QC Plan or the UDOT Manual of Instruction, which require the Environmental Document QC Form, signed by the Environmental Program Manager and the Director of Environment, be provided to the UDOT Signatory Official with the request for approval of the Draft EIS.

Project file reviews and interviews with UDOT staff revealed an inconsistent approach to conducting and documenting the QA/QC process for DCEs. The Audit Team reviewed project files for four DCEs. This review revealed three different approaches to conducting the required QA/QC for these projects. Two of these QA/QC reviews used one form, the third used a different form, and the fourth project had neither a form nor other documentation in ProjectWise. These inconsistencies in practice suggest that UDOT's QA/QC procedures may not be effective. The UDOT may also be unnecessarily increasing its risks when staff do not follow stipulated quality control reviews prior to making NEPA decisions.

Legal Sufficiency

Successful Practices

During the audit period, outside counsel issued two findings of legal sufficiency per the requirements of 23 CFR 771.125(b) and 23 CFR 774.7(d), copies of which were provided to the Audit Team. Through interviews, the Audit Team learned UDOT has continued using the legal sufficiency process it put in place for both Section 326 CE and section 327 NEPA Assignment, which is contracting with outside counsel who have extensive experience in NEPA, other environmental laws, and Federal environmental litigation. The UDOT Environmental Managers work directly with outside counsel without the need to go through the Utah Attorney General's (AG) Office. Nevertheless, an Assistant AG assigned to UDOT is kept apprised of all communications between UDOT staff and outside counsel and reviews all bills submitted by outside counsel. Outside counsel have been included as part of the "project team" from the start of projects, and some have reviewed draft notices of intent for EISs. In addition, the UDOT, an Assistant AG, and outside counsel hold quarterly meetings at which UDOT staff apprise counsel of upcoming project reviews and anticipated review deadlines.

Training

Successful Practices

The UDOT has created a training plan that is customized to each employee's needs and disciplines to provide more focused training opportunities by specialty. The UDOT provides training on general environmental topics, such as NEPA, and provides opportunities for subject matter experts to take training related to their disciplines.

Performance Measures

Successful Practices

The UDOT's self-assessment documented the performance management details of the NEPA Assignment program in Utah, which demonstrates UDOT's procedures under NEPA assignment have resulted in a 50 percent reduction in the time to complete DCEs, EAs, and EISs. The average time to complete environmental documents is 5 months for DCEs, 18 months for EAs, and 37 months for an EIS. Although these data are based on a limited number of completed UDOT NEPA reviews since January 2017 (nine DCEs, two EAs, and one EIS), UDOT's initial timeliness results are promising. The UDOT will continue to monitor its progress towards improving timeliness of environmental reviews as part of its performance under the NEPA Assignment Program.

Next Steps

The FHWA provided this draft audit report to UDOT for a 28-day review and comment period. The Audit Team considered UDOT comments in developing this draft audit report. The FHWA will publish a notice in the Federal Register for a 30-day comment period in accordance with 23 U.S.C. 327(g)(2)(A). No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted to finalize this draft audit report pursuant to 23 U.S.C. 327(g)(2)(B). Once finalized, FHWA will publish the final audit report in the Federal Register.

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